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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NOREEN CARDINALE, Plaintiff and Appellant, v. DANIEL R. MILLER, JR., et al., Defendants and Respondents.	A125546 (Contra Costa County Super. Ct. No. C0800657)

Noreen Cardinale appeals from a judgment entered after the trial court sustained demurrers to her complaint against mortgage broker Home Loan Services Corporation (CHL), its owner, and one of its agents. The crux of the appeal is whether Cardinale's allegations against these defendants state a claim for conspiracy to effect fraudulent transfers in violation of the Uniform Fraudulent Transfer Act (Civ. Code, §§ 3439 et seq. (the UFTA)). We conclude that they do, and therefore reverse and remand the action to the trial court.

BACKGROUND

In *Cardinale v. Miller* (Jan. 31, 2005, A100606 & A101914) [nonpub. opn.], this court affirmed Cardinale's judgment for more than $600,000 in damages against Daniel Miller.[1] This current appeal arises from Cardinale's efforts to collect on that judgment and a related federal judgment.

[1] Three years earlier, our colleagues in Division Four affirmed a judgment in favor of Cardinale against one of Miller's codefendants. (*Cardinale v. Fitz-Stephens* (May 28, 2002, A093851) [nonpub. opn.].)

I. *The Complaint*

In this action, Cardinale sued Miller, CHL, CHL's owner Keith Charles Knapp, its agent Derald Kenoyer, and others. Her first amended complaint alleges Miller operates a "refinance ponzi scheme" through which he shielded his assets from Cardinale's judgments. According to the complaint, he obtains loans on properties that he owns and controls through sham entities, and converts the loan proceeds to his personal use. Then he either pays off prior loans secured by the properties at a discount without recording a reconveyance so that creditors will believe the properties have no equity; or, having converted the equity to cash, he allows the loans to default and the properties to be sold at foreclosure. The complaint alleges Miller was aided and abetted in this scheme by the other defendants and, specifically, that CHL, Knapp and Kenoyer brokered at least 23 loans for Miller's sham entities resulting in cash payments to them totaling about $9,500,000.[2] Cardinale further alleges that the properties that stood as security for 20 of these loans were later foreclosed upon after Miller intentionally over encumbered them pursuant to his scheme.

The complaint alleges on information and belief that Kenoyer arranged loans to Miller's relatives and sham entities knowing that Miller was using the loans to fraudulently hide his assets from Cardinale. Kenoyer allegedly conspired to aid and abet Miller in this scheme and received enormous commissions for his complicity. Cardinale alleges that Kenoyer, among other things, "arranged for his brother in law in Bellingham, Washington to act as the 'front person' on filings for two of [Miller's] limited liability companies when in fact said individual had no participation or interest in such entities; said defendant in fact filed as organizer for one or more of [Miller's] limited liability companies; said defendant provided the use of his office[']s address as the principal address of some of ['Miller's] single member limited liability holding companies but in violation of statute, no records were maintained there. Said limited liability companies,

[2] For simplicity, we at times refer to CHL and Knapp as the mortgage brokers or broker defendants.

including those set up through [Kenoyer] used as agent for service of process, an individual with four different addresses, none of which resulted in actual service; and there were service addresses which did not exist." According to the complaint, Kenoyer and CHL knew the loans were made to enable Miller to monetize the equity of his real property assets without Cardinale's knowledge.

As to Knapp, the complaint alleges he knew or should have known that Miller was the actual recipient of the loan proceeds, that the point of Miller and Kenoyer's enterprise was to defraud Miller's creditors, and that Miller had a dismal record of defaults and foreclosures. Knapp allegedly allowed Miller and Kenoyer's activities to continue so he could reap extravagant commissions. The complaint alleged Knapp knew Kenoyer was arranging the loans without loan applications, reference to lending standards, or regard to the borrowers' creditworthiness; that Knapp knew or should have known the borrowing entities were a sham; and that the loans were inadequately secured and being used to get money out of the secured properties. The complaint further alleges Knapp deliberately breached his duty to supervise and regulate Kenoyer because Kenoyer's activities were extremely profitable.

This appeal primarily concerns Cardinale's second cause of action, against all defendants, for fraudulent transfer and conspiracy to engage in fraudulent transfer. The second cause of action alleges that all of the defendants conspired to prevent Cardinale from enforcing her judgments by using fictitious entities to hold title to Miller's assets and monetize the equity "in a concerted plan to avoid the judgments herein by failing to disclose the existence of the judgments to investors and with a pattern of over encumbering the properties resulting in predictable foreclosure. In such manner, defendants dissipated assets by engaging in a fraudulent transfer of all of the equity, even while defendants received enormous cash fees and enabled [Miller] to convert equity to untraceable cash." The mortgage lender defendants, it was alleged, knew about the scam and knew that there was almost no possibility the loans would ever be repaid.

II. *The Demurrer*

CHL and Knapp demurred to the second cause of action on the ground that it failed to allege they owed any duty to Cardinale or did anything but act as mortgage loan brokers. They demurred to the fourth cause of action, for injunctive relief, on the grounds that it failed to allege any wrongful act and the allegations against them were made on information and belief. Knapp also demurred to the entire complaint on the ground that it failed to allege any actionable conduct against him as an individual.

The court sustained the demurrer without leave to amend. The court found Knapp and CHL could not be held liable for fraudulent transfer as though they were themselves judgment debtors or third parties who have possession or control over a judgment debtor's assets. It explained: "Although CCP 708.210 provides for enforcement of judgment actions against third parties, there are no allegations that moving Defendants have 'possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor,' which is necessary to maintain an action for fraudulent transfer. Further, plaintiff does not allege these moving Defendants are debtors. A 'judgment debtor' is the person or entity against whom the judgment is rendered. (CCP 680.250) Thus, the moving Defendants are not the debtors so cannot be liable for fraudulently transferring or fraudulently incurring an obligation." The trial court rejected Cardinale's conspiracy claim against CHL and Knapp because "Plaintiff has not alleged sufficient facts to show that moving Defendants were part of a conspiracy to aid the judgment debtor, Daniel R Miller, Jr., to fraudulently transfer his assets." The court sustained the demurrer to the injunctive relief cause of action because Cardinale had not alleged any tort or other wrongful act against Knapp and CHL and because she waived any objections to it by failing to address it in her opposition. The court found the complaint could not be cured through amendment and sustained the demurrer without leave to amend.

Kenoyer filed a joinder in the broker defendants' demurrer. After the court sustained the demurrer as to Knapp and Kenoyer it ruled the joinder was moot in light of that order, and ordered that Kenoyer be dismissed from the action. Cardinale filed a

timely appeal from the judgments of dismissal entered in favor of Knapp, CHL and Kenoyer.

DISCUSSION

I. *Standard of Review*

"A general demurrer 'searches the complaint' for a failure to state a cause of action as a matter of law. [Citation.] On review from an order sustaining a general demurrer, ' "[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Stanton Road Associates v. Pacific Employers Ins. Co.* (1995) 36 Cal.App.4th 333, 340-341.) With these principles in mind, we turn to the parties' arguments.

II. *The Law on Conspiracy to Effect Fraudulent Transfers*

The UFTA provides remedies to unsecured creditors for fraudulent transfers of assets made to impede the collection of their claims. "A fraudulent conveyance under the UFTA involves ' "a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim." ' [Citation.] 'A transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer . . . . [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829; *Mejia v. Reed* (2003) 31 Cal.4th 657, 664.) A creditor who is damaged by a fraudulent transfer can set the transfer aside or seek other appropriate relief under Civil Code section

3439.07. (*Monastra v. Konica Business Machines, U.S.A., Inc.* (1996) 43 Cal.App.4th 1628, 1635 -1636.)

The trial court correctly ruled that neither Knapp nor CHL may be held liable for a fraudulent conveyance. Whatever the legal landscape may be for Miller and the third parties to whom the challenged loans were disbursed, there is no allegation here that Knapp or his company are either debtors or transferees within the meaning of the UFTA. (Civ. Code, § 3439 et seq.) "The so-called 'dominion' or 'control' test determines who is a transferee and requires, at a minimum, 'dominion over the money or other asset, the right to put the money [or asset] to one's own purposes' " (*In re Cohen* (Bankr. 9th Cir. 1996) 199 B.R. 709, 715.) Even given the most liberal of interpretations, Cardinale's complaint does not allege that Knapp or CHL was in a position of "dominion" or "control" over the allegedly fraudulent loan proceeds. The question, then, is whether the complaint alleges facts sufficient to sustain a claim against Knapp and CHL for *conspiring* to engage in fraudulent transfers with Miller or the purported borrowers. It does.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) " ' "The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. . . . In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity." ' " (*Id.* at p. 511.)

The complaint here adequately alleges a tort. The UFTA applies to *all* transfers, including the transfer of equity by means of secured loans. "Transfer," as used here,

means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." (Civ. Code, § 3439.01, subd. (i); *Mejia v. Reed, supra,* 31 Cal.4th at p. 664.) Cardinale alleges that Miller transferred equity in his real properties to lenders through loans to fictitious entities under his personal control in order to prevent Cardinale from executing on the properties in satisfaction of her judgments. Those allegations are sufficient to state a UFTA claim against Miller and the ostensible borrowers under his control. (Civ. Code, §§ 3439 et seq.; see *Filip v. Bucurenciu, supra,* 129 Cal.App.4th at p. 834.)

We are also satisfied the complaint states a claim against Knapp and CHL for conspiracy to engage in fraudulent transfers. It is settled law that a person other than the debtor or transferee who conspires with others to effect a fraudulent transfer may be held jointly liable for the creditor's damages. (*Monastra v. Konica Business Machines, U.S.A., Inc., supra,* 43 Cal.App.4th at pp. 1644-1645; see *Qwest Communications Corp. v. Weisz* (S.D.Cal.2003) 278 F.Supp.2d 1188, 1192 [applying California law]; *Gutierrez v. Givens* (S.D.Cal.1997) 989 F.Supp. 1033, 1044 [applying California law; *Taylor v. S & M Lamp Co.* (1961) 190 Cal.App.2d 700, 706 ["a debtor and those who conspire with him to conceal his assets for the purpose of defrauding creditors are guilty of committing a tort and each is liable in damages."].) Cardinale alleges these broker defendants conspired with Miller to deplete the equity in his real properties that would otherwise have been available to pay Cardinale's judgments, by enabling him to convert that equity to untraceable cash. Cardinale further alleged these defendants participated in Miller's plan to over encumber the properties, knowing that there was almost no possibility the loans would be repaid; that they were paid enormous fees for their participation in the scheme; and that the scheme injured Cardinale by depriving her of recourse to assets that could satisfy her judgments.[3] These allegations are sufficient to state a cause of action

[3] Cardinale does not allege the mortgage brokers' fees were paid from the loan proceeds.

for conspiracy. (*Applied Equipment Corp v. Litton Saudi Arabia Ltd., supra,* 7 Cal.4th at p. 511.)

Knapp and CHL argue they did nothing wrong because a lender has no legal duty to protect the interests of its borrowers' creditors or police the moral conduct of its borrowers. True, but that does not mean a lender (or broker) is free to knowingly conspire with a judgment debtor in a scheme to defraud the debtors' creditors. The law has been quite clear in this regard for almost 50 years. (See *Taylor v. S & M Lamp Co., supra,* 190 Cal.App.2d at p. 706; see also *Qwest Communications Corp. v. Weisz, supra,* 278 F.Supp.2d at p. 1192 & fn. 4 ["[i]ndeed, *everyone* has a duty not to commit an intentional tort against *anyone.*"].) Defendants' duty argument is inconsequential because Cardinale alleges they actually knew that Miller was refinancing his properties in order to thwart Cardinale's efforts to collect on her judgments; knew Miller held title in the names of fictional entities so he could keep the refinance scheme going while he monetized all equity in the properties; knew the loan proceeds were actually going to Miller; and concealed the existence of Cardinale's judgments from investors. This conduct, if true, goes far beyond a failure to "police the conduct of the borrower" or "deny loans to . . . a scofflaw."

Knapp and CHL's other, scattershot arguments are unpersuasive. They say Cardinale's theory that they conspired with Miller to drain the equity from his properties suffers a "glaring flaw" in that the equity in the encumbered properties "belonged to the borrowing entities," not Miller. But, the complaint alleges that Miller in fact owns and/or controls those entities, and that he converts the proceeds of the refinance loans to his own personal use. The fact that he does not hold legal title in his own name is entirely consistent with Cardinale's theory of liability.

The mortgage brokers' contention that Cardinale "has not articulated how making loans to [Miller] impeded her ability to collect" equally lacks merit. The complaint, reasonably construed, alleges that Miller and the other defendants conspired to monetize equity that Cardinale otherwise could have attached or executed upon to satisfy her judgments. The law does not require, as defendants imply, that Cardinale must also

allege that she attempted to enforce her judgment against Miller's allegedly fictitious entities; that she created any liens against the real properties that secured the loans; or that those liens would have taken priority over the refinance loans.

Defendants' argument that the complaint fails to allege any wrongdoing by Knapp also fails to persuade. Cardinale alleges that Knapp knew or should have known that the loans were part of a scheme to evade Cardinale's attempts to satisfy her judgments against Miller, but, due to the "extravagant" profit Knapp stood to make, he deliberately allowed the scheme to continue in breach of his duty as an officer-broker to supervise Kenoyer's activities. The complaint also includes alter ego allegations that are sufficiently broad to encompass Knapp and CHL. Finally, the broker defendants' comment that Cardinale "concedes that [Miller] is not a record member or manager of the LLCs and the LLCs were not, themselves, Judgment Debtors" is irrelevant to whether she has stated a claim for conspiracy.

In summary, the complaint alleges sufficient facts to state a conspiracy claim against the broker defendants. The trial court thus erred when it sustained the demurrer to the second cause of action.

III. *Injunctive Relief*

In support of her fourth cause of action, for injunctive relief, Cardinale alleged she lacked an adequate remedy at law "as demonstrated by [her] inability . . . to obtain compliance with these Judgments since 2002 despite the obvious ability of Judgment Debtor to satisfy the judgments." She therefore asked the court to enjoin Miller from transferring any interests in assets or income, including security interests, or from acquiring assets or income other than in his true name without prior court approval.[4] She

[4] We grant judicial notice that on October 28, 2009, after the rulings on demurrers that are contested in this appeal, the trial court issued a default judgment against Miller and granted Cardinale's requested injunctive relief as against him. We previously construed Cardinale's December 15, 2009, motion to augment the record with this and other postjudgment documents as a request for judicial notice, and deferred consideration thereof pending consideration of the appeal on the merits. We now decline to take

further asked that the other defendants, including Knapp and CHL, be enjoined "from engaging in any further and future transactions with Judgment Debtor or his agents or which in any way involve him without demonstrating to this court that said transactions are in the ordinary course of business in compliance with industry standards and for adequate consideration to which Plaintiff may have resort."

The broker defendants' demurrer to this cause of action was premised on their contention that, as against them, the complaint alleged no underlying tort to be enjoined. Our above discussion of the conspiracy claim demonstrates the fallacy of defendants' contention, and, with it, the trial court's basis for sustaining the demurrer to the fourth cause of action. Accordingly, the order sustaining the demurrer to the fourth cause of action must also be reversed.

DISPOSITION

The order sustaining the demurrers and the judgments dismissing Knapp, CHL and Kenoyer are reversed and the action is remanded to the trial court for further proceedings.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.

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judicial notice of the other documents presented with the motion, which are not relevant to disposition of the appeal.